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ALEXANDER L. STEVAS,

Nos. 80-1923 and 80-2135

In the Supreme Court of the United States

OCTOBER TERM, 1981

TOMMIE L. FULKS, PETITIONER

v.

AVONDALE SHIPYARDS, INC., AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

AVONDALE SHIPYARDS, INC., CROSS-PETITIONER

v.

TOMMIE L. FULKS AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The petition for a writ of certiorari in No. 80-1923 presents the question:

1. Whether substantial evidence supports the administrative law judge's findings that (a) claimant's pulmonary infection was aggravated but not caused by his shipyard work and (b) his permanent disability is less than total.

The cross-petition in No. 80-2135 presents the questions:

2. Whether substantial evidence supports the ALJ's finding that the aggravation of claimant's lung condition was covered under the pre-1972 Longshoremen's and Harbor Workers' Compensation Act because it resulted from exposure to sandblasting on at least two occasions over actual navigable waters.

3. Whether the ALJ correctly concluded that claimant complied with Sections 12 and 13 of the Act, 33 U.S.C. 912 and 913, by timely filing a claim as soon as he became aware of the relationship between his disease and his employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 76a-87a)[1] is reported at 637 F.2d 1008. The opinions of the Benefits Review Board (Pet. App. 15a-19a, 25a-27a, 54a-75a) are reported at 3 B.R.B.S. 415, 5 B.R.B.S. 392.1, and 10 B.R.B.S. 340. The opinions of the administrative law judge (Pet. App. 1a-14a, 28a-50a, 51a-53a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1981, and a petition for rehearing was denied on March 24, 1981 (Pet. App. 88a-89a). The petition for a writ of certiorari was filed on May 15, 1981, and the cross-petition was filed on June 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Tommie L. Fulks worked for cross-petitioner Avondale Shipyards as a welder from 1952 until 1966 (Pet. App. 10a). In 1966, he was hospitalized and treated for a pulmonary disease (*id.* at 2a). The disease was ultimately diagnosed as atypical mycobacteriosis due to Group III Battey type bacillus (*id.* at 6a-7a). He returned to work at Avondale in March 1967 but fell ill again after a few weeks. He returned to work a second time in March 1968, but was re-hospitalized in August of that year (*id.* at 2a, 10a). Fulks attempted to return to work at Avondale upon remission of his disease in early 1971, but was refused employment because of

[1] The appendices to the petition and the cross-petition contain identical pagination.

his lung condition (*id.* at 4a). He has not worked since that date (*id.* at 2a).

Fulks filed a formal claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, on October 12, 1971, and the case was referred to an administrative law judge (ALJ) (Pet. App. 12a, 78a). Fulks contended that his original lung condition was caused by the inhalation of dust, sand, gases and fumes encountered on his job and that his relapses in 1967 and 1968 were precipitated by the same causes (*id.* at 2a). After a formal hearing, the ALJ concluded that Fulks' illness was not causally related to his employment (*id.* at 8a) and in any event was not covered under the Act because it did not occur upon navigable waters of the United States (*id.* at 5a-6a).[2] The ALJ rejected Avondale's contention that the claim was untimely under Sections 12 and 13 of the Act, 33 U.S.C. 912 and 913, which generally require written notice to the employer within 30 days and filing of the claim within one year of the injury.[3]

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[2] See former Section 3(a) of the Act, ch. 509, 44 Stat. 1426. Before 1972, the general rule was that persons injured on actual navigable waters were covered under the Act and persons injured on land were not. The 1972 amendments to the Act, however, moved the line determining federal coverage shoreward. See *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 719 (1980).

[3] The ALJ held that the limitations period did not begin to run until Fulks knew or had reason to know that his injury was job-related and that Fulks had no such knowledge until a doctor informed him of that possibility in 1971 (Pet. App. 4a). The ALJ further found that Avondale was not prejudiced by any failure to receive earlier notice because it had actual knowledge of claimant's illness and relapses and was able to call three supervisors at the hearing to testify as to the conditions of claimant's employment (*id.* at 4a-5a).

Fulks appealed the ALJ's decision to the Benefits Review Board pursuant to Section 21(b)(3) of the Act, 33 U.S.C. 921(b)(3). The Board upheld the ALJ's finding that claimant's injury was not within the coverage of the pre-1972 Act, because there was no evidence that Fulks worked upon actual navigable waters except for a few brief periods in 1967 (Pet. App. 18a-19a). The Board declined to reach the questions of whether Fulks' illness was causally related to his employment or whether he was disabled (*id.* at 18a).

Fulks filed a petition for review in the court of appeals under 33 U.S.C. 921(c). In a per curiam opinion (Pet. App. 20a-22a), the court reversed the denial of the claim, holding that it was unable to conclude that Fulks was not covered by the Act because he might have been exposed to airborne sand or iron particles while working on the water. The court remanded the case to the Board with the observation that "[t]he record before us leaves us in grave doubt that there is any support for the implicit finding of a valid *de minimis* rule of coverage in this case" (*id.* at 22a).

On remand, the Benefits Review Board held that " 'the amount of time spent over navigable waters during exposure to harmful stimuli causing or aggravating an occupational disease is unimportant and will not lend itself to apportionment between jurisdictions as long as the exposure over navigable waters was sufficient to have at least aggravated the condition' " (Pet. App. 26a, quoting *McCabe* v. *Sun Shipbuilding & Dry Dock Co.*, 1 B.R.B.S. 509 (1975), rev'd on other grounds, 593 F.2d 234 (3d Cir. 1979)). The case was then remanded to the ALJ.

At a supplemental hearing before the ALJ, Fulks and four of his former co-workers testified without contradiction to the proximity of sandblasting to

their welding work over the water and to the density of the sand in the air over the river (Pet. App. 32a-33a). The ALJ found that during the period of Fulks' reemployment in 1967 he "was exposed to sandblasting on at least two occasions while he was at work over navigable waters within 125 feet of the sandblasting operation" (*id.* at 46a). Revising his earlier finding, the ALJ found that "the evidence in the entire record as to exposure afloat in 1967 is sufficient to support coverage under the unamended Act" (*id.* at 35a).

The record was also expanded on the question of causation. Fulks' medical expert had testified in the first hearing that Fulks was suffering from silicosis (a lung disease due to inhalation of fine particles of sand), and hemosiderosis (fine particles of iron in the lung), both caused by his employment (Pet. App. 7a). Another expert testified in the second hearing that inhalation of free silica (sand) predisposes a person to the type of Battey bacillus infection from which Fulks suffered (*id.* at 37a-38a). This testimony, however, was countered by the opinions of two other medical experts who concluded that Fulks did not have silicosis or disabling hemosiderosis (*id.* at 38a-40a). These experts further concluded that Fulks' mycobacterial disease was not causally related to his job (*id.* at 8a, 38a-40a).

On the basis of this conflicting evidence, the ALJ concluded that Fulks' mycobacterial disease was not caused by his exposure to sandblasting and that he was not afflicted with silicosis or disabling hemosiderosis (Pet. App. 40a). He noted that Fulks' mycobacterial disease is not believed to be induced by inhalation of free silica and is widely believed to have its origins in the soil (*ibid.*). The ALJ found that Fulks did not have silicosis on the basis of clinical evidence showing a lack of deterioration in respira-

tory functions over a 10-year period, which is contrary to the usual progression of the disease (*id.* at 40a-41a).

Although the ALJ concluded that Fulks' lung condition did not develop because of exposure to sandblasting at work, he did find that the condition was aggravated by Fulks' job. The ALJ reasoned that after Fulks' initial bout with his mycobacterial disease "his lung tissue and/or respiratory organs were then subnormal or in weakened condition * * * [and] any destruction of defenses against bacteria might be enough to aggravate or reactivate the infection" (Pet. App. 41a-42a). He concluded that Fulks' exposure to sandblasting upon navigable waters after his return to work in 1967 was sufficient to aggravate his condition or contribute to its reactivation (*id.* at 42a). Accordingly, the ALJ determined that Fulks' relapse in 1967 was related in part to his job and the resulting disability was therefore compensable under the Act (*ibid.*).

On the question of the extent of disability, Fulks asserted that he was totally disabled, relying on the testimony of his counsel's law partner, a former industrial personnel manager, that most employers would refuse to hire Fulks because he was a poor compensation insurance risk (Pet. App. 43a). There was no factual evidence of any such refusal of employment, however, because Fulks had not tried to find another job in the nine years between his 1968 relapse and the second hearing, with the exception of a single unsuccessful attempt to be rehired by Avondale (*ibid.*). The ALJ therefore accepted the testimony of two vocational experts and Avondale's own personnel director indicating that Fulks' limitations would disqualify him from only a relatively minor part of the labor market (*id.* at 9a, 43a-44a).

The ALJ concluded that Fulks "has sustained permanent partial disability to the extent of something less than 25 percent of his [pre-injury] earnings" (Pet. App. 44a). Because Fulks had no actual post-injury earnings, the ALJ fixed his earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. 908(h), after considering various factors, including the degree of Fulks' physical impairment and the availability of jobs he was capable of performing. The ALJ determined that it was "reasonable to fix his earning capacity at $125.00 per week," and compensation was awarded based on that partial disability (Pet. App. 44a-45a).

Avondale and Fulks both appealed to the Benefits Review Board. The Board reviewed the evidence and held that "substantial evidence supports [the ALJ's] finding that claimant's condition was aggravated to some degree by his water-based exposure to free silica in 1967, and consequently that his claim is covered by the Act" (Pet. App. 64a-65a). The Board specifically rejected Avondale's argument that there was no coverage because any exposure during Fulks' last period of employment in 1968 was entirely ashore rather than on pre-1972 navigable waters (*id.* at 65a). The Board refused to apportion liability between state and federal remedies: "Exposure upon navigable waters is sufficient to bring the claim within the Act. The fact that other exposures were within the coverage of a state act does not limit the applicability of the Act to the aggravation of a condition which is thus concurrently within a state's jurisdiction" (*ibid.*). The Board noted that if it accepted Avondale's argument, "any employer could simply shift an employee to non-covered employment after years of injurious exposure, and frustrate the purposes of the Act" (*id.* at 66a).

The Board also held that the timeliness requirements of Sections 12 and 13 of the Act were met, concluding that under pre-1972 law " '[t]he limitation period for occupational diseases begins to run when the employee knows, or reasonably should know, that his condition is a disease which arose out of his employment' " (Pet. App. 67a, quoting *Aerojet-General Shipyards, Inc.* v. *O'Keeffe*, 413 F.2d 793, 795 (5th Cir. 1969)). Although Fulks had "general suspicions that his work may have aggravated his condition" after Avondale's refusal to rehire him in May 1971, he did not have the awareness necessary to commence the running of the limitations period until sometime in November of that year when his attending physician told him of the possible relationship between his silica exposure and his condition (Pet. App. 68a-69a). Thus, the Board concluded, Fulks' protective filing of a claim in October 1971 was timely. Furthermore, Avondale obtained notice of the claim within the allotted 30-day period because it "received claimant's protective October 1971 claim from the [Labor Department's] deputy commissioner within a month" (*id.* at 70a).

The Board rejected Fulks' claim that his disease developed because of work-related silicosis and was not persuaded by his contention that he is totally, rather than partially, disabled. The Board affirmed the ALJ's finding that Fulks did not have silicosis (Pet. App. 66a) and concluded that "ample evidence from vocational placement and rehabilitation experts" demonstrated that there are "a number of positions available * * * which claimant can perform with his disability" (*id.* at 71a).[4]

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[4] The Board was unanimous on the causation and timeliness issues. Board Member Smith, however, filed a partial dissent

Fulks and Avondale both sought review in the court of appeals, which affirmed the Board's order. The court held that the claim was not time-barred: "We are convinced by the abundance of evidence in the record that Fulks filed his application well within the one year statutory period" (Pet. App. 85a).[5] The court rejected Avondale's argument that Fulks could only be covered under state law because his last period of sandblasting exposure was not on a federal situs (*id.* at 83a) and affirmed, as based on substantial evidence, "the findings of a work-related aggravation of a pre-existing disease and consequential partial permanent disability" (*id.* at 86a). The court concluded that "[a]fter weighing [the conflicting medical] evidence, the ALJ credited certain testimony and drew permissible inferences * * * which we find both rational and supported by substantial evidence" (*ibid.*). Finally, the court affirmed as fully supported by the evidence the finding that the "disability is only partial and that Fulks

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as to the permanence of the disability and extent to which it was compensable under federal law. He stated (Pet. App. 75a) that he would

> only affirm an award under the Act for temporary disability for the period bounded by the time claimant left work in 1967 after exposure upon navigable water and the time he returned to work entirely ashore in 1968. Any recurrence of the disease caused by this final period of employment in 1968 is compensable under [state] law, since the Act in 1968 did not provide shoreside coverage.

[5] The court rejected Avondale's argument that it failed to receive timely notice on two grounds: (1) Avondale had knowledge of the illness and was not prejudiced by a lack of written notice, and (2) Avondale in any event received a copy of Fulks' formal claim within a month of its filing (Pet. App. 85a-86a).

is capable of employment of consequence" (*id.* at 87a).

ARGUMENT

The court of appeals correctly upheld the Benefits Review Board's decision and order. The petitions pose no significant legal issue or any issue on which there is a conflict among the circuits. Rather, they essentially present fact-bound questions that have been thoroughly reviewed by the administrative law judge, the Board and the court of appeals. Review by this Court is therefore unwarranted.

1. The scope of review of the ALJ's fact findings under the LHWCA is well-established. Administrative findings of fact must be accepted if supported by substantial evidence in the record considered as a whole. See, *e.g.*, *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 361-362 (1965); *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 477 (1947); 33 U.S.C. 921(b)(3); 5 U.S.C 706(2)(E). This standard applies even where " 'the facts permit the drawing of diverse inferences. The [ALJ] alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable [as based on substantial evidence], may not be disturbed by a reviewing court.' " *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, *supra*, 380 U.S. at 362, quoting from *Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*, 330 U.S. at 478. The Benefits Review Board and the court of appeals both properly applied this standard of review in affirming the various fact findings of the ALJ.

2. Petitioner Fulks argues (Pet. 6) that the ALJ should have found that his disease was not merely

aggravated but was actually caused by his exposure to sandblasting on the job. He further contends that the ALJ should have found him totally rather than partially disabled. Fulks does not dispute the existence of substantial evidence in the record supporting the ALJ's findings on these two points.[6] Instead, he argues that the evidence presented by the two parties was conflicting and that the ALJ was therefore required to accept his position because the Act "tilt[s] the scale in favor of the injured workman when evidence [is] diametrically opposed" and because "doubts [must] be resolved in favor of the injured workman" (*id.* at 5).

None of the cases upon which Fulks relies (Pet. 5), however, vitiates the substantial evidence rule, which leaves to the fact-finder the duty to weigh conflicting evidence and to draw the more reasonable inference. As a matter of sound compensation policy, the courts have recognized that when the record leaves a question wholly in doubt it should be re-

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[6] Petitioner Fulks' argument, therefore, cannot be based on the Act's Section 20(a) presumption (33 U.S.C. 920(a)), which is at issue in *U.S. Industries* v. *Director, OWCP*, No. 80-518 (argued Oct. 6, 1981). Section 20(a) provides that "it shall be presumed, *in the absence of substantial evidence to the contrary*—(a) that the claim comes within the provisions of this Act" (emphasis added). The employer here presented substantial evidence on the points disputed by Fulks, so the presumption is inapplicable. Cf. *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935) ("Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption [against suicide contained in Section 20(d)] falls out of the case. * * * [The presumption's] only office is to control the result where there is an entire lack of competent evidence."). The Section 20(a) presumption was not addressed below by the ALJ, Benefits Review Board, or court of appeals. Petitioner Fulks mentions it only in passing in his opposition to the cross-petition (80-2135 Br. in Opp. 3).

solved in favor of the claimant. This principle "place[s] the burden of possible error on the employer who is better able to bear it." *Bath Iron Works Corp.* v. *White*, 584 F.2d 569, 574 (1st Cir. 1978). Accord, *e.g.*, *Parsons Corp. of California* v. *Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980); *Ryan-Walsh Stevedoring Co.* v. *Trainer*, 601 F.2d 1306, 1316 (5th Cir. 1979). But this rule has never meant that when there is conflicting evidence the testimony favoring the claimant is entitled to more weight, as a matter of law, than testimony favoring the employer; its application is properly limited to situations in which the fact-finder has no other principled basis for resolving conflicts. See *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 888 (2d Cir. 1944).

The ALJ's findings against Fulks on causation and extent of disability were based on substantial evidence. The ALJ's conclusion that Fulks' lung condition was not caused by his exposure to sandblasting is amply supported by evidence in the record that Fulks' mycobacterial infection originates from bacteria in the soil, rather than from inhalation of free silica (Pet. App. 40a). The ALJ's findings regarding silicosis are likewise based on abundant credible medical evidence, including pulmonary function tests and clinical observations over a 10-year period that failed to demonstrate the expected progression of the disease if actually present (*id.* at 40a-41a). Similarly, the finding of partial rather than total disability was based on the testimony of three experts that Fulks could perform many available jobs.[7] In short, the ALJ's factual determinations

[7] The ALJ found this evidence more credible than the testimony of the law partner of Fulks' counsel who believed that Fulks would be unable to find any employment because he was a poor compensation insurance risk. There was "no

were rational, in accordance with law and supported by substantial evidence. They were properly affirmed by both the Board and the court of appeals after examination of the record. They present no issue requiring review by this Court.

3. Avondale no longer disputes, as it did below, that Fulks' disease was permanently aggravated by his exposure to sandblasting on the job. It does contend, however, that the court of appeals and administrative tribunals erred in holding it liable for the disabling disease under the federal statute. Avondale asserts that the federal law does not apply because Fulks' silica exposure while on a covered federal situs was de minimis (Cross-Pet. 7-8) and because it was not his *last* period of exposure to sandblasting (*id.* at 8-10). Both of Avondale's coverage arguments must fail.

As to the first prong of its argument, Avondale is unable to cite any case for the proposition that a de minimis standard applies to federal coverage under the LHWCA.[8] As the Board and the court of appeals recognized (Pet. App. 63a, 83a), the issue here is merely whether there is substantial evidence

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factual evidence" to support this opinion, because Fulks had not sought jobs with any other employers (Pet. App. 43a).

[8] The two cases upon which Avondale relies for this proposition are inapposite. *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 135 F.2d 320 (5th Cir. 1943), aff'd, 321 U.S. 590 (1944) concerns the question of what constitutes compensable working time under the Fair Labor Standards Act. Avondale apparently also means to cite *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), rather than *United States* v. *Mt. Clemens Pottery Co.*, 331 U.S. 784 (1946). The former *Mt. Clemens* decision is also an FLSA case and recognizes that a de minimis rule may apply in assessing the compensability of time spent walking between a time clock and a work bench.

to support the ALJ's finding that Fulks' exposure to sandblasting while he was at work on navigable waters aggravated his condition. There is such evidence in the record. Claimant and four of his former co-workers testified without contradiction that they were exposed to sandblasting while at work on the water (*id.* at 32a-33a). Their testimony included estimates that the sandblasting was within 50 to 200 feet of their welding operations and their recollections that the sand in the air was quite dense ("like if you were in a desert") (*id.* at 33a). The ALJ reasoned that after Fulks had contracted his disease his "lung tissue and/or respiratory organs were then subnormal or in weakened condition" and exposure to sandblasting was sufficient "to aggravate or reactivate the infection," causing his relapse (*id.* at 41a-42a). This reasonable, fact-bound inference does not warrant review by this Court.

Avondale's second argument (Cross Pet. 8-10) is that Fulks' condition is compensable only under state law because his last period of employment (in 1968) was entirely ashore, rather than on navigable water covered under the federal statute. To support this argument, Avondale relies solely on the "last employer rule" as articulated in *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955). This rule provides that, when an employee has worked for more than one employer, full liability under the Act attaches to "the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease * * *" (*ibid.*). Avondale argues, by analogy, that a "last coverage rule" should be created to allocate responsibility between state and federal jurisdiction. Again Avondale can cite no authority for this proposition. The court of

appeals, however, was clearly correct in holding (Pet. App. 83a-84a) that a last-coverage rule does not logically follow from the last-employer rule. As the Board recognized, if Avondale's position were correct, "any employer could simply shift an employee to non-covered employment after years of [covered] injurious exposure, and frustrate the purposes of the [federal] Act" (*id.* at 66a).

4. Avondale's final argument (Cross-Pet. 12-13) is that Fulks' 1971 claim and notice to the employer were out of time under Sections 12 and 13 of the Act, 33 U.S.C. 912 and 913, because he "should have reasonably known his condition was work-related at the latest by August of 1968, when he was completely unable to continue working for Avondale." [9] This argument must be rejected for two reasons. First, Avondale did not present this contention in the proceedings below. It objected to the timeliness of Fulks' notice and claim, but did not address the

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[9] Section 12(a) requires that an employer be given notice, or have knowledge, of an employment-related injury within 30 days after the injury, or after the worker "is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury * * * and the employment." 33 U.S.C. 912(a). Section 13(a) requires that a written claim for compensation be filed within one year of the same event—*i.e.*, injury or actual or constructive awareness of job-relatedness. The statutory language tolling the limitations periods until the employment-relatedness of the disabling condition becomes apparent was not added until 1972, after Fulks' claim had been filed. But the Fifth Circuit has held (*Cooper Stevedoring of Louisiana, Inc.* v. *Washington*, 556 F.2d 268, 272 (1977)) that the amended provisions are applicable to any post-1972 adjudication, a ruling Avondale does not challenge (Pet. App. 84a). In any event, the same tolling provision was applicable to occupational-disease cases by judicial construction before the amendments. See, *e.g.*, *Aerojet-General Shipyards, Inc.* v. *O'Keeffe*, 413 F.2d 793, 795 (5th Cir. 1069).

question of when Fulks knew or should have known that his illness was employment-related. Avondale simply argued that Fulks' claim was time-barred because he knew that he had a disabling disease in 1968; it totally ignored the standard requiring awareness of employment-relatedness. Second, all of the evidence in the record supports the rulings below that Fulks did not know, and could not reasonably have known, that his condition was related to his job until his physician told him of the possible medical connection in November 1971 (Pet. App. 4a, 68a-69a, 85a).[10] This amply supported and fact-bound conclusion does not merit further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Avondale points to no evidence to the contrary, but merely emphasizes that Fulks knew in 1968 that he could not continue his job as a welder with Avondale because of his health at that time. But, although Fulks knew he had to leave his job in 1968 due to ill health, it does not follow that he should have known that the conditions of his employment were *causing* the aggravation of his disease.

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